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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. _____

JOHN W. HADZIMA, Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN W. HADZIMA, prays that a Writ of Certiorari issue to review the judgments entered in this case on November 10, 1953, and on January 23, 1956, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, p 13) is reported at _____.

JURISDICTION

The judgment of the Court of Appeals as to appellant

HADZIMA, was entered on January 23, 1956, (Appendix A, infra, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether a defendant has had a fair trial where, after two jurors, each on separate occasions had communicated with third persons, one a government witness, the trial judge, in the exercise of his discretion (A) failed to determine whether (1) each of the two jurors had spoken to other members of the jury panel concerning such communications and (2) whether knowledge of the communications came to the attention of the other members of the jury panel; (B) failed to question the other members of the jury (1) whether they were spoken to or discussed with anyone the matter of the two contacts, and (2) if so, what effect it had upon them in their deliberations.

Whether a reasonable doubt exists from such failures that the other jurors did not know of such contacts, and had not thus formulated an adverse opinion against petitioner.

Whether the extraneous communications with the jurors effected petitioners right to a fair trial.

Petitioner JOHN W. HADZIMA joins with Petitioner ROY PURSSELLEY on such other issues presented by him; and points raised, stated and presented in ROY PURSSELLEY'S petition for Writ of Certiorari.

STATUTES INVOLVED

The Constitution of the United States, Amendment V (due process).

STATEMENT

During the course of the trial which began September 29, 1953, and ended October 21, 1953, one of the jurors NANCY JARVIS, while enroute from San Diego to Los Angeles by train, on Saturday, October 10, 1953, was seated next to a woman passenger who upon learning that NANCY JARVIS was a juror in the above entitled matter, told NANCY JARVIS that she was related to STEINER (another defendant) by marriage and briefly discussed STEINER'S illness with her. On Sunday morning, October 11, 1953, the juror, NANCY JARVIS, called the Trial Judge from Los Angeles and informed him of the foregoing. The trial judge told Mrs. Jarvis not to discuss the matter with anyone and requested that she see him on the following morning. (R-51-52)

On Monday morning, October 12, 1953, at 9:15 A.M., in the presence of a court reporter, Mrs. Jarvis testified under oath concerning the incident. Mrs. Jarvis stated that the train was crowded and that this woman took the seat next to her and that they began to converse. That when this woman learned that Mrs. Jarvis was a juror in the case, she told Mrs. Jarvis that she was related to Steiner by marriage; that he was a very sick man, that before the indictment he was belligerent, that he had gotten into bad company, that he had two fine children, that his wife was employed at Sears & Roebuck, and had it not been for such employment the Steiner's would have been unable to own a home. Mrs. Jarvis stated that she

did not believe that this woman intended to influence her, that the conversation had no effect upon her, and that it would not prejudice her either for or against the government or any of the defendants. (R-52)

At approximately 10:00 o'clock A. M., Monday morning, October 12, 1953, in the presence of the trial judge and all of the attorneys, the reporter read such testimony. Immediately thereafter the trial judge informed counsel of his deep concern over this incident.

The trial judge suggested that Mrs. Jarvis be excused from further service on the jury, and that she be replaced by the first of the two alternate jurors.

The trial judge also suggested that he interrogate all the jurors as to whether they had discussed the case with anyone or whether anyone had discussed or attempted to discuss the case with them. (October 12, 1953). Counsel for the defendants strenuously objected to both of the trial judge's suggesstions.

But on October 8, 1953, Rupert L. Hefner, then a government witness, was in Court on that morning when the trial judge admonished the jury not to read the newspaper, or listen to the radio or discuss the case with anyone. (R-57). However, Hefner stated that he did not hear the trial judge tell the jury not to talk with anyone, but interpreted the trial judge's remarks to mean that the jurors should not talk to any of the defendants. (R-57)

Prior to October 8, 1953, he had invited Mrs. Gloria Miller, one of the jurors to ride with him and that at such time he knew that she was a juror. This was corroborated by Mrs. Gloria Miller that Hefner

had stopped several times before October 8, 1953.

On October 8, 1953, Hefner saw juror Miller waiting for a bus and picked her up and took her to her home and was with her until approximately 7:00 o'clock that evening. (R-707)

On October 12, 1953, Hefner was excused as a government witness; that evening he again contacted juror Miller at her home, came over to her home and stayed a short time. (R-729)

Hefner testified that he told juror Miller that he owned a pet shop in Los Angeles; that he knew 2 or 3 of the defendants; that Steiner "was a legitimate business man, the same as I was"; that he did most of his business with "independent growers--backyard people with backyard aviaries"; that he had been subpenaed to testify for the Government--that he was going to testify but "as far as his testimony was concerned, he didn't know whether it will have any bearing on the case or not."

That juror Miller told him "the testimony was confusing--out of 9 people, what is supposed to fit who?" To which he replied, "I don't know, I haven't heard the testimony."

That she heard his name mentioned by the witness Jones who testified that he (Jones) had delivered birds to Hefner, and that he replied, "Yes, Mr. Jones had been in his pet shop 4 or 5 times."

That she mentioned a humorous incident that occurred in court, which he also heard, and that she said such incident "brought out a little laugh, or

something of that kind, to relieve the tension a little bit, as far as sitting and listening." (R-39-40)

The humorous incident to which Mr. Hefner referred, concerned the testimony of a Customs Agent who trailed a truck containing birds. Hadzima was a passenger in this truck, which the records showed he owned. Just as the truck reached a traffic control signal, which required the driver of the truck to stop, Hadzima jumped from the truck, ran around it to the automobile of the Customs Agent and engaged the Customs Agent in conversation. While he was telling the Customs Agent about an "important smuggler," the driver of the truck containing the birds drove away and disappeared. (R-42)

Mrs. Miller did not recall that there was any mention made of the humorous incident to which Mr. Hefner referred, nor did she recall that she had ever told him that she was confused at any time about the testimony, but she said that she may have made such a statement because, at that point, the evidence was quite confusing. (R-41)

Mrs. Gloria Miller testified that Lee Hefner told her that he was in the bird business; that he bought birds from everybody, including Mr. Jones, the defendants, and 200 or 300 backyard breeders; that he had been subpenaed as a witness by the Government but, on the second conversation, he told her that he had signed a statement for Mr. Sankary, the assistant United States Attorney, and that he did not have to testify on the witness stand; that he was to get his witness fees for having come to San Diego, and having spent so much time there.

To these specific questions she replied:

Q. "Where were you, if you recall, when you were waiting for this bus?"

A. "I was on Broadway, I was on this side of the street and I was walking to the corner to get the bus, I think it was this State Street, State on Broadway. It was in front of the hotel, San Diego Hotel. I had just left one of the other jurors." (R-738)

Q. "And on those occasions, you got the Coronado bus?"

A. "Well, once here at the bus stop. The second time I was going to lunch and he pulled up. I was with, I had just left the other jurors then, too." (R-739)

THE COURT: "Now, tell us everything that you think that he said, what you said, that has any relevancy to this case?"

THE WITNESS: "Well, the only thing that had any relevancy whatsoever, was the fact he was in the bird business and sells, raises birds, and he told me that he had two or three hundred backyard bird breeders himself that he bought from. That_____"

THE COURT: "How did you happen to talk to him about birds when you knew that this case was about birds?"

THE WITNESS: "I don't know. It is stupidity,

"is all I can say, my own stupidity."

THE COURT: "Now, didn't you recall that practically at every session of this court I_____"

THE WITNESS: "Yes".

THE COURT: "---_____urged you not to talk to any witnesses, or anybody connected with the case in any respect, or even listen to the radio?"

THE WITNESS: "Well, I complied with everything else. When I met him I didn't know who he was and I don't like to be rude; when he called up that evening, I didn't want to be rude, and I thought this was the last time I will see him and I wouldn't be bothered with him." (R-730)

The court was not informed of either of the conversations Hefner had with Mrs. Miller for almost a week after the jury returned its verdict. (R-60)

REASONS FOR GRANTING THE WRIT

It is important that defendants be afforded a fair trial. In that respect defendants should be tried by impartial jurors who are not disturbed by outside influence or even mere opinion (verbal, newspaper or otherwise); nor by the least amount of guidance respecting any part or portion of the evidence which might or could be substituted by the juror in place of the evidence presented in the trial of the matter. Mattox vs. U. S., 146 U. S. 140, 13 S. Ct. 50 36 L Ed

917 (1892).

The Trial Judge had the foregoing in mind, he said: "It is well settled that communications relative to a case on trial between jurors and third persons or witnesses are not only improper but also presumptively prejudicial to the rights of defendants." (R-38) In the instant case two such known contacts occurred between a juror and a third person during the course of the trial. In relation thereto, the Trial Judge stated: "It likewise cast upon the government the burden to dispel such presumption and to show that no prejudice would or could result to the defendants or any of them. (R-39) The following cases being cited:

Wheaton vs. U. S. (Cir. 1943) 133 F. 2d 522; Chamber vs. U. S., (8 Cir. 1916) 237 Fed 513; Lewis vs. U. S. (1 Cir. 1924) 295 Fed. 441; Klose vs. U. S., (8 Cir. 1931) 49 F. 2d 177; Cavness vs. U. S., (9 Cir. 1951) 187 F. 2d 719; U. S. vs. Rakes, (D. C. E. D. Va) 74 Fed. Supp. 645.

In connection with the motion for a new trial, based primarily upon the ground that a juror, to-wit, GLORIA ANN MILLER, had been in contact with a government witness, to-wit, LEE HEFNER, the Trial Judge also knew that another of the jurors, to-wit, NANCY JARVIS, had talked to a relative of the defendant, FRED W. STEINER, (R-51-52-53).

After the juror NANCY JARVIS, had talked to the relative of the defendant FRED W. STEINER, the matter came to the attention of the Trial Judge when the juror Mrs. Jarvis called the Trial Judge to advise him of her discussion with this person. (R-51-52)

Contrasted with the contact of the juror GLORIA ANN MILLER, by the government witness LEE HEFNER, the juror GLORIA ANN MILLER had not acted in such good faith; did not call the Trial Judge, but clandestinely or otherwise withheld this information from the Court in spite of the Court's admonitions. Such action on her part gives way to suspicion and conjecture regarding her good faith in disclosing her entire conversation with the government witness, LEE HEFNER. It would seem that her statements regarding her conversation with this government witness should have been viewed with distrust; and should have placed the Court on further inquiry regarding the knowledge, of these contacts, of the entire jury panel.

Following the Jarvis incident, the Court stated in its opinion: "I also suggested that I interrogate all the jurors as to whether they had discussed the case with anyone or whether anyone had discussed or attempted to discuss the case with them". (R-53)

In view of the foregoing, since the Trial Judge already had in mind interrogating the rest of the jurors following the Jarvis incident, this should have been done when the Hefner-Miller matter came to his attention.

It is petitioner Hadzima's contention that the Trial Judge did not go far enough in dispelling the presumption of prejudice; that there is left to conjecture whether the jury panel was tainted.

The burden rested on the government in the exercise of the trial judge's discretion to fully dispel any possibility that the jury had by now become prejudiced toward the defendant. This burden it would seem

could not be waived by a defendant or defendants since the matter would tend to go to the essence or substance of the trial.

It is petitioner Hadzima's further contention that a reasonable doubt now exists that other jurors did not know of the Jarvis and Miller contacts.

The trial judge or the government, while having the burden of proof to dispel the presumption of prejudice neither questioned juror Jarvis nor juror Miller regarding whether either or both spoke to any of the jurors respecting their contacts with third persons.

It is petitioner's contention that the government or the trial judge should have asked jurors Jarvis and particularly Miller the specific questions whether they mentioned or spoke concerning their contacts, with the other jurors.

The other jurors were not questioned whether they were spoken to or spoke to anyone or discussed with anyone the matter of the Jarvis and Miller contacts; or whether they had knowledge of these contacts, and if so, what effect it had and the substance of such conversation.

It is petitioner's contention that the government or the trial judge should have asked the other jurors the specific questions whether they knew; had been spoken to or discussed with anyone concerning the JARVIS and MILLER contacts.

Particular prejudice was created against the defendant JOHN W. HADZIMA regarding the mention

by Miller of the humorous incident where HADZIMA, a passenger in a truck which had to stop for a traffic control signal jumped out and engaged the Customs in a conversation permitting the driver of the truck containing the birds to drive on. Hefner said juror Miller did mention this incident; Mrs. Miller stated she did not recall mentioning it.

In the ELMER F. REMMER v. U. S. A., No. 156, October Term, 1955, in the Supreme Court of the United States, decided March 5, 1956, the Court stated "For it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made" (P. 5 of the opinion). Also, as stated in the REMMER case, there should be a full hearing by the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD P. LASHER,
Attorney for Petitioner,
JOHN W. HADZIMA

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 14,152

Jan. 23, 1956

FRED W. STEINER, JOHN W. HADZIMA, OLIVE SPICUZZA, CHARLES WALKER and ROY PURSSELLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court For the Southern District of California, Southern Division.

Before MATHEWS and CHAMBERS, Circuit Judges, and FOLEY, District Judge.

MATHEWS, Circuit Judge.

Appellants (Fred W. Steiner, John W. Hadzima, Olive Spicuzza, Charles Walker and Roy Pursselley) and others were indicted in the District Court for the Southern District of California. The indictment was in 11 counts. Appellants pleaded not guilty and had a

jury trial, in the course of which counts 2, 3, 4, 5, 6 and 7 were dismissed. The jury returned verdicts finding Steiner and Hadzima guilty on counts 1, 8, 9, 10 and 11, Spicuzza guilty on counts 1, 8 and 9, Walker guilty on counts 1, 10 and 11 and Purselley guilty on count 1 only. From judgments entered on these verdicts appellants appeal.

Appellants contend that the indictment failed to charge an offense against the United States, thus, in effect, contending that each of counts 1, 8, 9, 10 and 11 failed to charge such an offense.

Count 1 alleged, in substance, that on December 10, 1949, and continuously thereafter until August 5, 1953,[1] in the Southern Division of the Southern District of California, appellants, their codefendants and others conspired to commit offenses against the United States, namely, violations of 18 U.S.C.A.

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[1]The date on which the indictment was returned.

§ 545,[2] by knowingly and willfully, with intent to defraud the United States, smuggling and clandestinely introducing into the United States merchandise, namely, psittacine birds, which should have been invoiced; by fraudulently and knowingly importing merchandise, namely, psittacine birds, into the United States contrary to law; and by knowingly receiving, concealing and facilitating the transportation and concealment of such merchandise after importation, knowing the same to have been imported into the United States contrary to law. Count 1 further alleged, in substance, that on specified dates between December 10, 1949, and May 10, 1953, in the Southern Division of the Southern District of California, appellants and their coconspirators did

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[2]At all pertinent times, § 545 provided:

"Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced ***; or

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

"Shall be fined not more than $5,000 or imprisoned not more than two years, or both. ***"

35 overt acts[3] to effect the object of the conspiracy. Thus count 1 charged an offense against the United States, namely, a violation of 18 U.S.C.A. § 371.[4]

Appellants contend that the birds mentioned in count 1 were not merchandise, within the meaning of 18 U.S.C.A. z 545. There is no merit in this contention.[5]

Count 1 failed to state what law (other than 18 U.S.C.A. § 545) the importations mentioned therein

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[3]The overt acts were described in count 1.

[4]At all pertinent times, § 371 provided:

"If two or more persons conspire *** to commit any offense against the United States, *** and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the punishment provided for such misdemeanor."

[5]See definition of "merchandise" in 19 U.S.C.A. § 1401(c). It should be noted that 19 U.S.C.A. § 1401(c) was derived from § 401(c) of the Tariff Act of June 17, 1930, 46 Stat. 708, and that 18 U.S.C.A. § 545 was derived from § 593 of the same Act, 46 Stat. 751.

were contrary to, or in what respect such importations were contrary to such law. Appellants contend that the failure so to state rendered count 1 fatally defective. There is no merit in this contention.[6]

Count 8 alleged, in substance, that on or about April 3, 1952, in the Southern Division of the Southern District of California, appellants and their codefendants fraudulently and knowingly imported into the United States certain merchandise, namely, a number of psittacine birds, contrary to law. Count 9 alleged, in substance, that on or about April 3, 1952, in the Southern Division of the Southern District of California, appellants and their codefendants knowingly received, concealed and facilitated the transportation and concealment of certain merchandise, namely, a number of psittacine birds, after importation, knowing the same to have been imported into the United States contrary to law. Count 10 was similar to count 8, and count 11 was similar to count 9, except that the date mentioned in counts 10 and 11 was September 22, 1952, instead of April 3, 1952. Thus each of counts 8, 9, 10 and 11 attempted to charge a violation of 18 U.S.C.A. § 545 and did not charge or attempt to charge any other offense. However, each of counts 8, 9, 10

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[6]Wong Tai v. United States, 273 U. S. 77. Like the indictment in the Wong Tai case, count 1 of the indictment in this case charged a conspiracy and did not charge or attempt to charge any substantive offense. Hence appellants' contention as to count 1 finds no support in Keck v. United States, 172 U. S. 434, or in Babb v. United States, 5 Cir., 218 F. 2d 538.

and 11 failed to charge a violation of 18 U.S.C.A. §545 and failed to charge an offense against the United States.[7] Hence the convictions on counts 8, 9, 10 and 11 were improper.

The defect in counts 8, 9, 10 and 11 could not have been cured by a bill of particulars.[8] It is therefore immaterial that appellants did not move for such a bill.

At the trial, after the close of the Government's evidence, Hadzima, Spicuzza, Walker and Pursselley, by their counsel, Clifford L. Duke, Jr., moved the District Court[9] "to compel the Government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned." The motion was not granted, but was--impliedly, if not expressly--

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[7]Keck v. United States, supra; Babb v. United States, supra. Counts 8, 9, 10 and 11, like the counts involved in the Keck and Babb cases, attempted to charge substantive offenses, not conspiracies. Hence the holding in Wong Tai v. United States, supra, is inapplicable to counts 8, 9, 10 and 11. There was not at any pertinent time any law absolutely prohibiting the importation of psittacine birds into the United States. Hence such cases as Wong Lung Sing v. United States, 9 Cir., 3 F. 2d 780, are not in point here.

[8]Babb v. United States, supra.

[9]Steiner does not appear to have joined in the motion.

denied. Appellants,[10] contend that it should have been granted. However, it did not relate to count 1, but related only to the substantive counts of the indictment. The only substantive counts here involved are counts 8, 9, 10 and 11. In view of our above stated conclusions as to these counts, we need not and do not consider the contention that the motion should have been granted.

The trial began on September 29, 1953, and ended on October 21, 1953. Between those dates, many recesses were taken. During such recesses, the jurors were permitted to separate, after being properly admonished. On Onctober 8 and October 12, 1953, during such recesses, a juror, Gloria Ann Miller, also known as Gloria Miller, had conversations with Rupert L. Hefner, also known as Lee Hefner. On October 29, 1953--after the verdicts were returned and before appellants were sentenced--appellants filed a motion for a new trial. A stated ground of the motion was "The jury committed misconduct during the trial in that certain jurors conversed with witnesses subpoenaed to testify on behalf of

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[10]Including Steiner.

the Government[11] outside the courtoom." There was attached to the motion a supporting affidavit of Hefner, from which it appeared that he had conversed with Miller on October 8 and October 12, 1953. The District Court conducted a hearing on the motion--a hearing at which Hefner and Miller testified as witnesses.[12] Finding that appellants were not prejudiced by the conversations between Hefner and Miller, the District Court denied the motion. Appellants contend that they we were prejudiced by the conversations and that therefore the motion should have been granted. However, the District Court's finding that appellants were not so prejudiced was supported by the evidence and is accepted by us as correct. Furthermore, the motion was

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[11] Hefner was subpoenaed to appear at the trial as a witness for the Government. He did appear, but did not testify at the trial. It is not here contended, nor does the record show, that any juror other than Miller conversed with any witness, or that Miller conversed with any witness other than Hefner.

[12] These witnesses were examined by counsel for the Government, by counsel for appellants and by the District Court. No other testimony was adduced or offered at the hearing.

addressed to the District Court's discretion.[13] The denial of such a motion is reviewable, if at all, only for an abuse of discretion.[14] Here no abuse of discretion is shown.

Appellants were sentenced on count 1 under and in conformity with the first paragraph of 18 U. C. S. C. §371.[15] Steiner, Spicuzza, Walker and Pursselley contend that the offenses the commission of which was the object of the conspiracy charged in count 1 were misdemeanors only,[16] namely, violations of a regulation, 42 C. F. R. § 71.152(b), prescribed by the Surgeon General of the United States under 42 U. S. C. A. § 264 and punishable under 42 U. S. C. A. § 271(a), and that therefore, if sentenced at all on count 1, appellants should have been sentenced under and in conformity with

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[13]Allred v. United States, 9 Cir., 146 F. 2d 193; Banks v. United States, 9 Cir., 147 F. 2d 628; Gage v. United States, 9 Cir., 167 F. 2d 122; Cagleston v. United States, 9 Cir., 172 F. 2d 194; Grover v. United States, 9 Cir., 183 F. 2d 650; Adams v. United States, 9 Cir., 191 F. 2d 206.

[14]Grover v. United States, supra.

[15]See footnote 4.

[16]See 18 U. S. C. A. § 1.

second paragraph of 18 U.S.C.A. § 371.[17] There is no merit in these contentions.[18] Nor is there any merit in Hadzima's contention that the offenses the commission of which was the object of the conspiracy charged in count 1 were punishable under 18 U.S.C.A. §§ 42 and 43 and under 42 U.S.C.A. § 271(a). Obviously, they were punishable under 18 U.S.C.A. § 545[19] and hence were felonies.[20] Accordingly, and properly, appellants were sentenced on count 1 under and in conformity with the first paragraph of 18 U.S.C.A. §371.

The judgments against Steiner and Hadzima are affirmed as to count 1 and reversed as to counts 8, 9, 10 and 11. The judgment against Spicuzza is affirmed as to count 1 and reversed as to counts 8 and 9. The judgment against Walker is affirmed as to count 1 and reversed as to counts 10 and 11. The judgment against Pursselley is affirmed in toto.

(Endorsed:) Opinion. Filed Jan. 23, 1956. Paul P. O'Brien, Clerk.

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[17] See footnote 4.

[18] Murray v. United States, 9 Cir., 217 F. 2d 583.

[19] See footnote 2.

[20] See 18 U.S.C.A. § 1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 14,512

FRED W. STEINER, JOHN W. HADZIMA, OLIVE SPICUZZA, CHARLES WALKER and ROY PURSSELLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause against Steiner and Hadzima be, and hereby are affirmed as to count 1 and reversed as to counts 8, 9, 10 and 11, and that the judgment against Spicuzza be, and hereby is affirmed as to count 1 and reversed as to counts 8 and 9. The judgment against Walker is affirmed as to count 1 and reversed as to counts 10 and 11. The judgment against

Pursselley is affirmed in toto.

(ENDORSED) Judgment
Filed and Entered: January 23, 1956
PAUL P. O'BRIEN, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, March 15, 1956

Before: MATHEWS and CHAMBERS, Circuit Judges, and FOLEY, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant HADZIMA, filed February 20, 1956, and within time allowed by the rule of Court for a rehearing of the above cause be, and hereby is denied.

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384899—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 795

ROY PURSSELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 851

JOHN W. HADZIMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 753–758) is not yet reported. The opinion of the District Court (R. 34–64) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1956 (R. 759) and peti-

tioner Hadzima's petition for rehearing was denied on March 15, 1956 (Pet. H. App. 25). By order of Mr. Justice Clark entered on February 14, 1956, the time for filing petitioner Pursselley's petition for a writ of certiorari was extended to March 23, 1956, and the petition was filed on that date. Hadzima's petition for a writ of certiorari was filed on April 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a conviction for the felony of conspiring to smuggle birds into the United States is invalid because the particular offense could also have been prosecuted, as a misdemeanor, as a conspiracy to violate regulation 42 C. F. R. 71.152 (b) under the Public Health Service Act prohibiting the bringing of psittacine birds into the United States for the purpose of sale or trade.

2. Whether psittacine birds are "merchandise" within the terms of 18 U. S. C. 545.

3. Whether the court below was in error in holding that the evidence did not disclose prejudice to petitioners in two limited contacts of a juror with one Hefner.

STATUTES AND REGULATIONS INVOLVED

18 U. S. C. 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States,

or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. 545:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, * * *; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence suf-

ficient to authorize conviction for violation of this section.

* * * * *

The Public Health Service Act, 58 Stat. 682, 703, 704, 706, 42 U. S. C. 264 (a), 265, 271:

SEC. 361. (a) The Surgeon General, with the approval of the Administrator, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. * * *

* * * * *

SEC. 362. Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and

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for such period of time as he may deem necessary for such purpose.

* * * * *

SEC. 368. (a) Any person who violates any regulation prescribed under sections 361, 362, or 363, or any provision of section 366 or any regulation prescribed thereunder, * * * shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

* * * * *

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42 C. F. R.:

SEC. 71.152. *Psittacine birds: Definitions; restrictions on entry—*

(a) *Definitions.* As used in this section and § 71.153, the term:

(1) Psittacine birds" inclnudes birds commonly known as parrots, Amazons, African Grays, cockatoos, macaws, parakeets, lovebirds, lories, lorikeets, and all other birds of the order Psittaciformes.

* * * * *

(b) *Import restrictions.* Psittacine birds shall not be brought into the United States for the purpose of sale or trade. * * *

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals (R. 759) affirming judgments of the District Court for the Southern District of California adjudging petitioners guilty, upon the verdict of a jury, of conspiracy to smuggle and introduce into the United States, contrary to

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law, certain merchandise, *i. e.*, psittacine birds, and to receive and conceal such merchandise (R. 3–5, 64–65, 66–67). Pursselley was sentenced to four years' imprisonment (R. 66–67) and Hadzima to five years' imprisonment (R. 64–65). A fine of $5,000 was imposed upon Hadzima (R. 65).[1]

The trial commenced on September 29, 1953 (R. 34). One of the first witnesses testified that, shortly before the trial, one or more of the defendants had informed him that repeated postponements of the trial would be sought and, in the event that the case did come to trial, they would procure a mistrial (R. 49). Upon a hearing outside the presence of the jury concerning threats to the witness, the trial judge considered remanding all of the defendants to the custody of the United States Marshal during the pendency of the trial. He refrained from doing so only upon assurance by all the attorneys that they would immediately bring to the court's attention any information which they received concerning

[1] The remaining ten counts of the indictment (R. 14–20) charged five substantive offenses of specific importations of psittacine birds (Counts 2, 4, 6, 8, 10) and five substantive offenses, on the same dates as the importations, of receiving, concealing and facilitating the transportation and concealment of the birds (Counts 3, 5, 7, 9, 11). Counts 2–7 were dismissed during the course of the trial and the judgments on Counts 8–11 were reversed upon appeal upon the basis that the allegation that petitioners brought in or concealed merchandise imported contrary to law did not specify the law which was violated (R. 753, 755–756, 759).

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threats made to any witness, or attempts at bribery. It was also agreed that, until the case was over, none of the defendants would talk to any person whom they knew to be a government witness (R. 49).

On October 7, during noon recess, Joseph Wolf, the attorney for defendant Steiner, requested the court's permission to call a witness out of order. He stated that Lee Hefner of Los Angeles had been subpoenaed by the government and that, after Hefner testified for the government, he wanted to call him immediately thereafter as a character witness for Steiner in order to avoid the expense of having Hefner return from Los Angeles. The United States Attorney consented but added that he did not know whether he would call Hefner because he had not yet talked to Hefner and did not know what his testimony would be (R. 50).

During the afternoon session of court on the same day as Wolf's request concerning Hefner, defendant Steiner had a "seizure", causing the adjournment of court to the next day (R. 50). A prominent doctor designated by the court to examine Steiner reported a probably self-induced functional disturbance. When Steiner's attorney refused consent to allow the trial to proceed without Steiner's presence, the trial was recessed at 10:30 of the morning of October 8 until October 12 (R. 50–51). The jury was admonished, as it

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had been admonished theretofore, against discussing the case with anyone (R. 51, 296).

Upon the recess of court, Hefner drove by a bus stop and offered a ride to Coronado to Gloria Miller, one of the jurors (R. 707, 724), whom he identified as "the blonde girl that sat here in the front row" (R. 706). Mrs. Miller did not know how Hefner had learned that she lived in Coronado (R. 725, 738–739). Hefner had seen Mrs. Miller in the jury box during his attendance at the trial (R. 706) and had theretofore attempted to pick her up at the bus stop (R. 57, 706)—several times, according to Mrs. Miller's testimony (R. 57, 724, 734). The two had lunch together at a restaurant, at which the principal subject of conversation was the matter of Mrs. Miller's divorce (R. 717–718, 727, 736–737). They were together no later than 5:00 of the afternoon, according to Mrs. Miller (R. 728) or about 7:00 according to Hefner (R. 707). According to both Hefner and Mrs. Miller the only references in their conversation to the case were casual (R. 707–708, 718); they did not discuss the merits or the guilt or innocence of the defendants (R. 41, 710–711, 725–726, 731; see *infra*, pp. 11, 12–16.

On Sunday morning, October 11, the judge received a long distance call from Los Angeles from Mrs. Nancy Jarvis, a juror. She informed him that, on the previous evening, while en route from San Diego to Los Angeles by train, a woman passenger, who occupied an adjoining seat, upon

learning that she was a juror in this case, told her that she was Steiner's sister-in-law and briefly discussed Steiner's illness with her (R. 51–52). On Monday morning, October 12, in the presence of a court reporter, Mrs. Jarvis testified under oath concerning the incident. The woman had told Mrs. Jarvis that Steiner was a very sick man; that, before the indictment, he was belligerent; that he had gotten into bad company; that he had two fine children, and that his wife was employed and, had it not been for such employment, the Steiners would have been unable to own a home. Mrs. Jarvis stated that she did not believe that this woman intended to influence her; that the conversation had no effect upon her; and that it would not prejudice her either for or against the government or any of the defendants. A reporter then read such testimony in the judge's presence and in the presence of all the attorneys (R. 52, 463–469).

Immediately thereafter, the judge informed counsel of his deep concern over this incident, particularly in view of the earlier testimony of a witness relative to the plan of the defendants to obtain a mistrial (*supra*, p. 6). He stated that he was seriously considering remanding all of the defendants, all of whom were out on bail, to the custody of the Marshal during the balance of the trial and of citing the person who talked to Mrs. Jarvis for contempt. He suggested that Mrs.

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Jarvis be excused from further service on the jury and that she be replaced by the first of the two alternate jurors, and that he interrogate all the jurors as to whether anyone had attempted to discuss the case with them (R. 52–53). Counsel for the defendants strenuously objected to both suggestions and urged the judge not to cite the person who had talked to Mrs. Jarvis for contempt, on the ground that it appeared to be an innocent conversation and on the further ground that any such action on his part would seriously prejudice the defendants, no matter how it was handled. They further urged the judge not to remand any of the defendants to the custody of the Marshal. The judge agreed not to take any action, but informed all of the attorneys that, if they received any information concerning any alleged jury tampering or intimidation of witnesses, he wanted to be notified forthwith (R. 53).

During such discussions or shortly thereafter, the judge was informed for the first time that Steiner was still in the hospital and that his physician was of the opinion that he should remain in the hospital for approximately two additional days. Steiner's physician, when reached, informed the judge that he could find no physical basis for Steiner's complaints. At the suggestion of Steiner's attorney, the judge asked him whether he was willing to order Steiner immediately released from the hospital and he agreed

to do so. The trial was recessed until 1:00 p. m., at which time Steiner appeared (R. 53–54).[2]

Hefner was dismissed as a witness on that day, October 12. That evening he appeared at Mrs. Miller's house several times during her absence, desiring to see her to say goodbye (R. 711, 717, 728–729). When she reached home, about midnight, the total visit lasted, according to Mrs. Miller, only 30 to 45 minutes (R. 728, 739), according to Hefner, two to two and one half hours (R. 712, 717). At this time the only discussion concerning the case was Hefner's remark that he had signed a statement and was not going to be called as a witness (R. 712, 729–731, 737). Hefner also spoke of having bought birds from all the defendants (R. 735–736).

On the afternoon of October 14, Steiner had another "seizure" in court. The doctor who examined him, stated, in the presence of the attorneys but outside the presence of the jury, that he was of the opinion that there was nothing wrong with Steiner and he repeated his previous opinion that, in all probability, the attacks were self-induced. The trial was recessed until the following day to permit the taking of an electro-encephalogram. The next day, after a re-

[2] Thereafter, two witnesses testified that they had either talked with several of the defendants or had overheard conversations between defendants in which such defendants had stated that, if they were ever brought to trial, they would attempt to obtain a mistrial (R. 54, 341, 574–575).

port that the electro-encephalogram showed a normal condition, Steiner appeared in court at 11:00 a. m. (R. 54–55).

The case was submitted to the jury on October 20, and the jury returned its verdict on the following afternoon. After the jury was discharged, it was agreed that motions for a new trial would be filed not later than Monday, October 26 (R. 55).

On the afternoon of October 26, the judge received a telephone call from Duke, the attorney for all the defendants except Steiner, requesting an additional day within which to file his motion because Steiner's attorney, who had offered to assist him, had not yet arrived in San Diego. The request was granted (R. 55–56). In a subsequent affidavit by Hefner he stated that he was first questioned about his contacts with Mrs. Miller by Duke on Monday, October 26, 1953 (R. 27).

On the following afternoon, October 27, a motion for a new trial was filed. Misconduct of jurors was alleged as one of the grounds for the motion, Duke alleging on information and belief that one of the jurors had engaged in a private conversation with a witness subpoenaed by the government (R. 20–22, 56).

On the same day, Mrs. Miller received a telephone call from the trial judge informing her of the issue that had been raised and instructing her not to discuss the facts with anyone, includ-

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ing himself, outside the courtroom (R. 23, 731-732).[3] That evening, James W. Smith, who had been at the counsel table with Duke during the trial (R. 56), came to Mrs. Miller's home (R. 732, 740). He presented a card representing himself as "Criminal Investigator" (R. 732) and seemed to know of Mrs. Miller's contact with Hefner, including the specific name of the restaurant where they had had lunch (R. 741). When Mrs. Miller started to phone the judge, Smith engaged her in conversation and questions, delaying the call to the judge (R. 733, 741). The judge asked that Smith be put on the line, and ordered him to refrain from further conversation with the juror, whereupon Smith left (R. 25, 733).

Prior to the hearing on the motion for new trial, defendants filed affidavits by Smith (R. 23–25) and Hefner (R. 26–27). At the hearing, at which attorneys Wolf and Duke waived presence of the defendants (R. 722–723), Hefner and Mrs. Miller testified (R. 704–746). Hefner testified that his only purpose in seeking Mrs. Miller's company was "no special reason at all; just because I had seen her. Well, she was taking a bus. It is just one of those things" (R. 706), and "because I liked her. * * * I did it on my own; nobody suggested it at all" (R. 711–712). Hef-

[3] The record does not indicate whether the judge phoned only Mrs. Miller, or phoned Mrs. Miller in connection with an immediate checkup of all of the jurors upon receipt of Duke's affidavit.

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ner was a married man with three children (R. 704).

According to Hefner's testimony, he was acquainted with most of the defendants, and had done business with some of them (R. 707–709, 720); he had agreed to testify as a character witness for defendant Steiner (R. 709–710); while the trial was in progress, defendant Hadzima had been to his place of business and "had picked up nest boxes and feeders" (R. 712). Hefner had been in court on the morning of October 8, when the court admonished the jury not to read the newspapers or listen to the radio or discuss the case with anyone, but he stated that he did not hear the court tell the jury not to talk with anyone. He interpreted the remarks to mean that the jurors should not talk to any of the defendants (R. 721). He told Mrs. Miller that he owned a pet shop in Los Angeles (R. 708, 714); that he knew 2 or 3 of the defendants (R. 708); that Steiner "was a legitimate business man, the same as I was" (R. 710); that he did most of his business with "independent growers—backyard people, with backyard aviaries" (R. 716–717);[4] that

[4] Hefner's name was mentioned on several occasions during the trial. The testimony of numerous witnesses, including some of the defendants themselves, showed that Hefner owned a pet shop in Los Angeles, and that the defendants had sold him birds. Witnesses for both the government and the defendants testified that in the United States there are hundreds, and perhaps thousands, of aviaries, including the so-called backyard breeders, which breed, raise, and sell

he had been subpoenaed to testify for the government (R. 710–711, 714); and that he was going to testify but "as far as my testimony, I don't know whether it will have any bearing on the case or not" (R. 719–720). Mrs. Miller (he testified) told him that "the testimony was confusing * * * of the nine people, what is supposed to fit who?", to which he replied, "I don't know; I haven't heard the testimony" (R. 711, 715). She also told him that she heard his name mentioned by the witness Jones who testified that he (Jones) had delivered birds to Hefner, and he replied, "Yes, Mr. Jones had been in my shop 4 or 5 different times" (R. 718–719). According to Hefner, Mrs. Miller also mentioned a humorous incident which was testified to in court, which he also heard (an incident involving Hadzima, see fn. 5, *infra*, p. 16), and said such incident "brought out a little laugh or something, kind of relieve the tension a little bit, as far as sitting and listening" (R. 710, 715–716).

According to Mrs. Miller: Hefner told her that he was in the bird business (R. 726); that he bought birds from everybody, including Mr. Jones, the defendants, and 200 or 300 backyard breeders (R. 726, 735–736); that he had been

parakeet and other psittacine birds. All of the defendants who testified stated that they were engaged in some phase of the bird business and several of them testified that they owned aviaries. Accordingly, no one testified or contended that either the purchase or sale of such birds to Hefner was illegal (R. 41).

subpoenaed as a witness by the government but, in the second conversation, he told her that he had signed a statement for the United States Attorney, and that he did not have to testify on the witness stand (R. 737). Mrs. Miller did not recall that there was any mention made of the humorous incident to which Hefner referred,[5] nor did she recall that she had ever told him that she was confused at any time about the testimony, but she said that she may have made such a statement because, at that point, the evidence was quite confusing (R. 727, 735–736). She testified that when she accepted a ride from Hefner she thought him only a spectator in the courtroom (R. 724), and that to the extent that the limited, casual remarks about the case came into the conversation at all, they had no influence upon her whatsoever (R. 728, 731). Throughout, she had no impression of suspicion concerning Hefner with respect to the case—"he was a whiz, and that was all" (R. 743).

At a subsequent hearing on the motion for a new trial, both the Assistant United States Attorney and Duke testified. The United States Attorney stated that he refrained from calling Hefner to the stand because he was hostile and refused to testify to facts which, because of other

[5] The humorous incident was an outburst of laughter in the courtroom, in which defendants participated, upon testimony depicting how Hadzima had fooled a customs agent (R. 42).

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evidence, the United States Attorney knew were true (R. 57–58).

Duke first testified that his wife had received an anonymous telephone call on Wednesday evening, October 21, but that he did not know of this conversation until the following day and that, although he had received other information thereafter, he did not know the names of either the juror or the person who talked to the juror until Monday, October 26. However, he later testified as follows (R. 58):

> Mr. Duke: "I said she received an anonymous telephone call inviting her to tell me that I should look into the question of the jury having been visited. At that time the statement was made by Government agents. However, following that on Friday, I received definite information and information from a source that I am not at liberty to reveal."

Duke also testified that he recalled the statement on October 12, after the Jarvis incident, in which the judge admonished him and the other attorneys that, if there was any other evidence of jury tampering, the judge wanted the information conveyed to him immediately. Duke sought to excuse his failure to do so by the statement, "The information came after the jury had returned their verdict and after they had been discharged by the court" (R. 59).

The trial judge, in ruling upon the motion for a new trial, expressly recognized the law to be

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that "communications relative to a case on trial between jurors and third persons or witnesses are not only improper but also presumptively prejudicial to the rights of defendants. It likewise casts upon the Government the burden to dispel such presumption and to affirmatively show that no prejudice did or could result to the defendants or any of them" (R. 38–39). However, he found, upon extensive review of the evidence (R. 39–44, 46–60, 63–64), that (R. 46):

> With every reasonable inference resolved in favor of the defendants, I am of the opinion that the Government successfully rebutted the presumption of prejudice against any defendant, and I find that such evidence did not and could not have prejudiced the defendants or any of them.

The trial judge particularly ascribed credibility to Mrs. Miller, stating (R. 44):

> * * * She was a forthright witness. She acknowledged her stupidity in violating the court's order not to discuss the case with anyone. She testifed fully and frankly as to all matters which were discussed, and I am convinced of the truth of her statement that nothing that transpired in these conversations with Hefner had any influence on her in her deliberations as a juror. Even disregarding such statement, there was nothing testified to by either Mr. Hefner or Mrs. Miller which in

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> any way could have prejudiced any of the defendants, and I so find.

The judge further pointed out the ample basis for the jury's verdict, without need of extraneous influence, in the array of documentary and testimonial evidence that was presented in establishing the existence and details of the extensive conspiracy to smuggle thousands of dollars worth of birds into the United States (R. 46–48, 63).

Upon appeal, the Court of Appeals held (R. 757):

> * * * [T]he District Court's finding that appellants were not so prejudiced was supported by the evidence and is accepted by us as correct. Furthermore, the motion was addressed to the District Court's discretion. The denial of such a motion is reviewable, if at all, only for an abuse of discretion. Here no abuse of discretion is shown.

The Court of Appeals also rejected the contention that punishment could only be imposed for the misdemeanor of conspiring to violate the regulations under the Public Health Act, and held that punishment was properly imposed for the felony of conspiring to smuggle, under 18 U. S. C. 371, 545 (R. 757–758).

ARGUMENT

1. Petitioners' first contention is that, since the conspiracy was one to deal with birds which were the subject of a regulation under the Public

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Health Act (*supra*, pp. 4–5), petitioners may be punished only for the misdemeanor of conspiring to violate the regulation, not for the more serious offense of conspiring to smuggle (*supra* pp. 2–4) (Pet. Pur. 9–11; Pet. H. 2*). The contention was precisely considered and aptly disposed of in the decision relied upon below, *Murray* v. *United States*, 217 F. 2d 583, 585 (C. A. 9), as follows:

> [T]he regulation of the Surgeon General, 42 C. F. R. § 71.152 (b), with certain marked exceptions as to permit for health purposes, provides, "Psittacine birds shall not be brought into the United States for the purpose of sale or trade." The imposition of a quarantine has no relation to the importation of goods contrary to any law. It is doubted that a mere police rule so motivated could dominate the field to the exclusion of express criminal statutes. In any event, no penalty is provided for importation specifically, and the authority is in an omnibus section of a general act which fixes penalties for violation of such regulations in general terms. If the enactment of the statute, 42 U. S. C. A. § 271, which was passed in 1944, had been later, it would not in any event have repealed the provisions of the statute directed against smuggling, which was passed in its present form in 1948 and fixes a definite penalty for such acts. The latter supersedes all

* "Pet. Pur." refers to the petition for a writ of certiorari of Roy Pursselley, No. 795; "Pet. H" to that of John W. Hadzima, No. 851.

> prior statutes and overrules regulations no matter when adopted. *Callahan* v. *United States,* 285 U. S. 515, 52 S. Ct. 454, 76 L. Ed. 914.

In other words, the two provisions do not cover precisely the same ground or the same transactions, but presuppose different proof. A prosecution may therefore, under undisputed principles, be brought under either provision. See *United States* v. *Gilliland,* 312 U. S. 86, 93, 95–96; *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45–46; *United States* v. *Sischo,* 262 U. S. 165, 169–170; *United States* v. *Kushner,* 135 F. 2d 668, 670–671 (C. A. 2), certiorari denied, 320 U. S. 212.

Petitioners' interpretation would have the smuggler of ordinary, harmless imports punished for a felony, but would require the offense to be reduced to a misdemeanor if there were the additional element of a menace to health in the subject-matter of the smuggling—as here, the grave danger of parrot fever.

Moreover, the conspiracy here charged embraced more than bringing in the birds for the purposes of trade, the only aspect covered by the Surgeon General's regulation. Petitioners were charged with conspiracy to smuggle in birds "which should have been invoiced" and with receiving, transporting, and concealing the birds, knowing them to have been imported contrary to law (R. 4–5). These objectives were violations

of the felony statute, 18 U. S. C. 545, not of the regulation.[7]

2. Petitioners' main attack is on the finding of the trial judge, fully sustained by the Court of Appeals, that they were not deprived of a fair trial by reason of the outside contact of one of the jurors with Hefner. The factual determination of the trial judge—made upon extensive and unlimited examination of both the juror and Hefner by the judge and petitioners' counsel, with full recognition that any possibility of prejudice not clearly negated must be resolved in favor of the defendants, and affirmed by the Court of Appeals—presents no issue for review by this Court.

The juror, Gloria Miller, was offered a lift home at a bus stop by Hefner and the ride was prolonged into lunch and an afternoon together. A few days later, Hefner called upon her at her home. Petitioner's persistent characterization of Hefner as a "government witness" or as "a witness subpoenaed by the Government" (Pet. Pur. 3, 6, 12; Pet. H. 2, 4–6, 9–10) ignores the uncontradicted fact that Hefner, although originally subpoenaed by the government, was never called upon to testify; that he was hostile to the

[7] Petitioners also seek to rely (Pet. Pur. 2, 4, 10, 14–14b; Pet. H. 2) upon Sections 42 and 43 of 18 U. S. C., relating to "wild" animals or birds. They overlook the specific statutory exclusion, in 18 U. S. C. 42, of "cage birds, such as domesticated canaries, parrots, * * *." The birds here were clearly "merchandise" under 18 U. S. C. 545.

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government and was willing to testify as a character witness for one of the conspirators (*supra,* pp. 7, 14–15, 16–17). Equally incorrect is the reference to the two occasions as "clandestine meetings", and the remark that "the court was not informed of either of the conversations * * * for almost a week after the jury returned its verdict" (Pet. Pur. 3; Pet. H. 8, 10). There is no evidence of any secrecy about either the completely public ride and lunch, or the evening visit. There is, moreover, no question but that the delay in immediate institution of a court inquiry was due to petitioners' attorney's failure to notify the court forthwith upon his first information about the matter.

Despite the agreement of all counsel, after the earlier Jarvis incident (*supra,* pp. 8–10), to notify the trial judge immediately of any further information of irregularity, the attorney for petitioners, Duke, failed so to notify the judge (later stating that the information came to him after discharge of the jury). The first date admitted by Duke as a time of receipt of notice by him—an alleged anonymous phone call—was October 22, 1953, one day after the jury verdict. He did not communicate with the judge then, nor on October 26, the date set for filing of motions for new trial, when he telephoned the judge concerning an additional day's time in which to file his motion. He said nothing about the information he had, which was then "definite" (*supra,*

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p. 17). The judge accordingly took up a trail that was five days colder than would have been the case had Duke notified him immediately.

Moreover, Hefner's actions had two possible motives, neither of which was to prejudice petitioners. One could have been that to which he swore upon oath in the inquiry by the trial judge —a mere desire to get acquainted with "the blonde girl that sat here in the front row" and, later, to tell her goodbye upon leaving the city. Alternately, his actions might have been a step in carrying out the ugly prediction, attested to by some of the witnesses, that the defendants would try every means of threat and delay and, failing in that, would precipitate a mistrial.[8]

But irrespective of Hefner's actual intentions, the effect—or rather, total lack of effect—on Mrs. Miller was clear and, in the view of the trial judge who was in the best position to evaluate her testimony, she was completely credible. The

[8] Some support for the latter analysis of Hefner's conduct may be said to appear in the delays caused by the defendant Steiner's medically inexplicable "seizures" in court, and in the coincidence of synchronization with such delays of the instant problem and an earlier problem concerning a juror. After Steiner's first "seizure", his sister-in-law took a seat next to juror Nancy Jarvis on a train and, upon learning that she was a juror at the trial, spoke sympathetically of Steiner. Petitioners' own attorneys vigorously objected to any need of extending the inquiry beyond the Jarvis testimony and to any calling in of alternate jurors (*supra*, pp. 8–10). The judge and all parties apparently agreed that that encounter had been of no effect whatsoever upon the jury.

principal conversation with Hefner had not been about the trial; the few comments with reference thereto had been (as also testified by Hefner) casual and insignificant. She had, indeed, at first thought Hefner to be only a spectator. Although he later mentioned to her that he had been called as a witness by the government, he referred favorably rather than unfavorably to one of the defendants as a legitimate business man. The alleged mention of the laughter in court (testified to by Hefner, but denied by her), when Hadzima's tricking of a customs agent was recounted, clearly would have added no weight to the testimony itself. Hefner also testified that Mrs. Miller had spoken of some confusion as to the facts of the trial, but that would have been of no significance at that earlier stage of the trial, and, moreover, it would attest no influence of Hefner upon her, either for or against the defendants.

There is, in short, no substantial evidence that to this juror the two meetings with Hefner had any real connection with the trial, much less that they in any way disturbed or upset her. Her first thought on the matter came when the judge called her after petitioners' lawyer, well after the end of the trial, first filed the allegation that there had been misconduct. At this stage and only then, did she become aware that a few casual remarks were now being complained of as misconduct. There is accordingly no basis for peti-

tioner Hadzima's innuendo (Pet. H. 10) that the juror "clandestinely" withheld information about the matter from the judge, as there is also a total absence of basis for seeking to imply that she had in any sense been "disturbed" (Pet. H. 8) by the two meetings.

Petitioners' attempt to analogize this case to the situation in *Remmer* v. *United States,* 350 U. S. 377, is without merit. There was here neither any limitation of the inquiry by the trial judge, nor was there any such evidence as appeared in the bribery talk in *Remmer* or in the talk with the other jurors there. Petitioners' current, wholly unsupported, theorizing concerning possible effect upon this juror--and even upon other jurors—is inconsistent with petitioners' own resistance to further inquiry of the Jarvis incident during the trial, and with the type and extent of their own examination of both Hefner and Mrs. Miller when these two persons and others were available to petitioners for examination. The evidence was clear, consistent, and uncontradicted that the casual remarks about the trial were insignificant and of no influence in any direction whatsoever.

CONCLUSION

The decision below is a proper application of established principles and, with respect to the claim of prejudice, involves and properly disposes of a particular factual situation. No conflict of

decisions is involved. It is respectfully submitted that the petitions for writs of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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